No. 13977

United States
COURT OF APPEALS
for the Ninth Circuit

YOSHIO MURAKAMI,

Appellant,

v.

JOHN FOSTER DULLES, AS SECRETARY OF STATE,

Appellee.

On Appeal from Judgment of the Circuit Court of the United States for the District of Oregon.

BRIEF FOR APPELLEE

WARREN E. BURGER,
Assistant Attorney General;
C. E. LUCKEY,
United States Attorney;
VICTOR E. HARR,
Assistant United States Attorney;
ENOCH E. ELLISON,
Attorney, Department of Justice;
PAUL J. GRUMBLY,
Attorney, Department of Justice.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-18-54-140

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BRIEF FOR APPELLEE[1]

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

This is an appeal from an order and judgment (R 79-80) entered on June 18, 1953, by the United States District Court for the District of Oregon, dismissing the plaintiff's complaint. The plaintiff sought a decree adjudging that he is a citizen of the United States and as such entitled to rights and privileges of a national of the United States, including a passport in order to re-

[1]Except where reference is made to the briefs filed by the parties the appellee, defendant below, is herein called defendant; the appellant is called plaintiff.

turn to the United States. The issue presented by the pleadings was whether or not the renunciation of United States nationality accomplished by the plaintiff pursuant to the provisions of former Title 8 USC 801(i)[2] (now Title 8 USCA Section 1481(a)(7)), was the result of coercion and not his free and voluntary act.

The complaint (R. 2) in the instant case[3] was filed on August 10, 1951, pursuant to Section 503 of the

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[2]Sec. 801. A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

"(i) making in the United States a formal written renunciation of nationality in such form as may be prescribed by, and before such officer as may be designated by, the Attorney General, whenever the United States shall be in a state of war and the Attorney General shall approve such renunciation as not contrary to the interests of national defense: * * *." 54 Stat. 1168, as amended by Act of July 1, 1944, 58 Stat. 677, 8 U.S.C.A. §801(i). The Act of July 1, 1944, added subsection (i).

[3]On August 23, 1948, plaintiff was joined as a party-plaintiff in the case of *Abo et al. v. Clark et al.*, 77 F. Supp. 806, wherein he and some 4,315 other persons sought to have set aside their renunciations of citizenship. (This case was considered by this Court on appeal. *McGrath v. Abo et al.*, 186 F. 2d 766). On November 6, 1951, plaintiff *Yoshio Murakami* filed a document entitled "Dismissal" with the District Court for the Northern District of California wherein he stated he substituted himself in pro per instead of Wayne M. Collins and dismissed the cause of action on his behalf in that case. The plaintiff, *Yoshio Murakami,* in the *Abo* case was included in Group V of the Designation of Plaintiffs set forth in Appendix A of the Government's Brief on Appeal in the *Abo* case. These various groups, some 20 in number, were included in the Defendant's Offer of Proof made to the District Court in the *Abo* case, the rejection of which proof this Court held to be in error. *McGrath v. Abo, supra.*

Nationality Act of 1940 as amended (former 8 USC 903; repealed by the Immigration and Nationality Act of June 27, 1952, §403) and alleged that plaintiff was born in Seattle, Washington, on March 9, 1920, and claimed his permanent residence to be Portland, Oregon (R. 2). Jurisdiction of the District Court was alleged, in Paragraph III of the Complaint, to lie in Title 8 USC Sec. 903. It was further alleged that while plaintiff was detained at the Tule Lake Relocation Center, subsequent to his evacuation, he renounced his United States citizenship in 1945, as a result of coercion and thereafter on December 29, 1945, left the United States for Japan (R. 3). The allegation is also made that the plaintiff applied for a passport at the Office of the United States Consul at Tokyo, Japan, for the purpose of returning to the United States as a citizen thereof but that said Consul denied the application on the ground that the plaintiff had lost his United States citizenship (R. 3). The Answer of the Defendant admitted the conclusion of law as to jurisdiction set forth in Paragraph III of the Complaint and further admitted the allegation of the plaintiff's application for passport and its denial by the United States Consul on the ground that plaintiff had lost his citizenship by virtue of his renunciation (R. 5). The allegation by plaintiff that his renunciation of United States citizenship was the result of coercion and not his free and voluntary act was expressedly denied, as was the fact that Japan was plaintiff's temporary residence (R. 5). By pre-trial order both parties admitted that the plaintiff on January 3, 1950 made an application to the American Vice-Consul at Yokohama

for passport to the United States as an American citizen and that said application was denied on the grounds that plaintiff had renounced his American citizenship while at the Tule Lake Relocation Center (R. 7, 22).

The District Court denied the plaintiff's application for a voluntary dismissal without prejudice filed pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure (R. 68) and filed its opinion on June 3, 1953 (R. 69-70). On June 18, 1953, the District Court filed its Findings of Fact and Conclusions of Law (R. 71-78) and entered its Order and Judgment, dismissing the complaint and ordered the plaintiff, in accordance with the provisions of Title 8 U.S.C. Sec. 903, be returned to Japan (R. 79-80).

The jurisdiction of the District Court rests upon the provisions of Section 503 of the Nationality Act of 1940 as amended (Title 8 USC 903).[4] This Court has juris-

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[4]Sec. 503. "If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence, for a judgment declaring him to be a national of the United States." * * *

diction to review the judgment of the District Court under Title 28 United States Code, Section 1291.

QUESTIONS INVOLVED

1. Whether the Court below committed reversible error in finding that the plaintiff did not sustain the burden of proving that his renunciation of United States citizenship was coerced and involuntary.
2. Whether the Court below abused its discretion in refusing to grant plaintiff's motion for voluntary dismissal made pursuant to Rule 41(a)(2), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

I.

Undisputed Facts

As stated in Appellant's Brief, the facts as to the general conditions existing at Tule Lake Relocation Center are for the most part not in dispute, most of them having been admitted in the pre-trial order (R. 7-22). The admissions as to such general conditions in the pre-trial order are substantially the same as those in the findings in the case of *Acheson v. Murakami,* 9 Cir. 176 F. 2d 953, 960. The general concurrence with and implementation of that decision by the Attorney General and the Department of State is known to this Court and is fully set forth in the Government's Brief filed in the *Abo* case, *supra,* and will not be repeated here.

Additionally the following facts appear to be undisputed. The plaintiff whose parents were born in Japan and subsequently immigrated to the United States, was born in Seattle, Washington, March 9, 1920 (R. 7).

When he was a few months old his parents returned to Japan taking plaintiff with them, where he continuously resided until December 1939. While resident in Japan the plaintiff attended Japanese public schools beginning at the age of seven in April 1927 and continuing to March 1935 (R. 8). He returned to the United States arriving at San Francisco, California, on or about January 2, 1940 (R. 7, 8). From January 1940 to March 1942 the plaintiff resided at San Lorenzo, California, and in May 1942 he was evacuated to the Salinas Assembly Center in Salinas, California, pursuant to Civil Exclusion Orders issued to all persons of Japanese ancestry who were resident of prescribed military areas (R. 8). On July 5, 1942, the plaintiff was evacuated from Salinas, California, to the Poston Relocation Center in Poston, Arizona, where he remained until October, 1943, at which time he was transferred to the Tule Lake Relocation Center at Newell, California (R. 8).

On December 20, 1944, the plaintiff by letter addressed to the Department of Justice requested that there be sent to him all forms necessary to renounce his citizenship (R. 33, Plaintiff's Contention No. 43). Thereafter on February 15, 1945, the plaintiff was afforded a hearing on his renunciation of citizenship before a hearing officer duly designated by the Attorney General, at which he executed and tendered to the hearing officer a formal written renunciation of nationality with a request for the Attorney General's approval thereof (R. 33-34, 41, Plaintiff's Contention Nos. 45 and 46). The aforesaid hearing officer on February 15, 1945 recommended approval of plaintiff's request for renunciation (R. 34,

42, Plaintiff's Contention No. 47). The Attorney General, on April 26, 1945, approved the plaintiff's renunciation of United States nationality as not contrary to the interest of national defense and notified the plaintiff of such approval (R. 34, 42, Plaintiff's Contention No. 48). On December 29, 1945, the plaintiff voluntarily sailed for Japan on the S.S. General Gordon (R. 22). On January 3, 1950, the plaintiff made application to the American Vice-Consul at Yokohama, Japan, for a passport to return to the United States as an American citizen and such application was denied on the grounds that plaintiff had renounced his American citizenship at the Tule Lake Relocation Center (R. 22). A Certificate of Identity was issued to this plaintiff on December 10, 1951 for the purpose of appearing in the instant action upon the condition that he shall be subject to deportation in case it shall be decided that he is not a national of the United States. He arrived in the United States in January of 1952.

II.

The Proceedings Below and the Effect of Prior Litigation Thereon

This Court, in the case of *McGrath, et al. v. Abo, et al., supra,* had before it the question of the validity of the renunciations of United States Nationality by some 4,315 native-born persons of Japanese ancestry, including the present plaintiff. Because of the oppressiveness of the general conditions prevailing at the Tule Lake

Relocation Center, set forth fully in its findings in *Acheson v. Murakami, supra,* this Court held in the *Abo* case that a rebuttable presumption arose, as to those renunciants confined at Tule Lake, that their actions of renunciations were involuntary, requiring the defendants to go forward with evidence to rebut the presumption. However, when such evidence is introduced the presumption disappears but the fact of the coercive conditions remains as a part of a plaintiff's showing to support his individual burden of proof (P. 773). In the *Abo* case, *supra,* the defendant designated and classified all of the plaintiffs into twenty different groups with respect to the evidence that would be offered to show the voluntary character of the renunciations. A description of the various offers of documentary proof relative to each of the twenty groups with the number of persons in each group is set forth in *Appendix "A" infra.* In *Abo,* it was unequivocally held that "the proposed evidence as to each group, save one group of 58 plaintiffs [as to whom the offer of proof was solely that they went to Tule Lake to be with family members,] *would overcome the presumption of coercion* (P. 774). (Emphasis supplied) .This Court held that the District Court erred in rejecting such evidence and, therefore, reserved the judgment as to most of such plaintiffs (including the instant plaintiff). Since plaintiff here renounced his citizenship at Tule Lake it is clear that the principles enunciated in the *Abo* case were at least applicable to (if not res adjudicata in) the proceedings below. It will be hereinafter shown, that they were substantially applied by the District Court and counsel for the parties to this cause.

Subsequent to the filing of the complaint and answer this cause came on for pre-trial on January 15, 1952, at which time plaintiff and defendant exhibited their documentary evdence. The pre-trial order was entered on January 19, 1952 (R. 56), and on January 31, 1952 the defendant filed its objections to plaintiff's pre-trial exhibits Nos. 2 through 9, in so far as they stated conclusions and opinions (R. 57). The plaintiff filed objections to certain pre-trial exhibits of the defendant (R. 59). Although the District Court did not rule on the admissibility of such exhibits at the pre-trial conference nevertheless they were exhibited to the Court prior to the taking of plaintiff's testimony and were subsequently admitted into evidence thereby fulfilling the defendant's requirements to go forward with the evidence as required by *Abo, supra.*

Appellant in his brief (P. 18) asserts that the defendant failed to produce evidence rebutting the presumption and seems to assert that he failed to produce any evidence to meet his burden of going forward with the evidence (P. 18). We believe this assertion to be erroneous for the following reasons. The District Court admitted familiarity with *McGrath v. Abo, supra,* with its requirement that the defendant offer documentary evidence in order to assume his burden of going forward with the evidence (R. 197-198). It would be presumptuous to assume that the District Court would prevent the defendant from offering evidence, as to which this Court in the *Abo* case stated he not only had the right, but the duty to do, as part of his case. Counsel for the defendant on five separate occasions offered in evidence

the Defendant's Pre-trial Exhibits (R. 172, 186, 193, 195 and 197). In commenting upon the Defendant's Pre-trial Exhibits Nos. 21 through 29, to some of which the plaintiff had made objection (R. 59) the District Court said as follows:

> "Again I am inclined to think they are admissible, but in view of the situation since I am going to take the whole thing under advisement, I shall be glad to rule upon them at the time, and if they are not entitled to admission I shall of course exclude them." (R. 196, 197)

That the trial court admitted the same in evidence is conclusively demonstrated by reference to its Order and Judgment entered on June 18, 1953 (R. 79-80), which Order states in pertinent part as follows:

> "Thereafter and on the 20th day of November, 1952, trial in the within cause was resumed, at which time documentary evidence was introduced; thereupon the Court took the within cause under submission and having considered oral testimony and documentary evidence adduced at the trial, and the court being advised in the premises and having made its findings and conclusions of law * * *"

The defendant offered the documentary evidence in order to show that the plaintiff received his education and formal schooling in Japan, refused to swear allegiance to the United States, applied for expatriation prior to his renunciation of citizenship, applied for expatriation subsequent to his renunciation of citizenship and voluntarily returned to Japan. This evidence is encompassed in the various offers of proof made by the defendant in the *Abo* case, *supra* (See Appendix "A" *infra*) as to which this Court stated that such evidence

would overcome the presumption of coercion. Such a holding makes such evidence material, relevant and competent, thus disposing of plaintiff's objections thereto.

The appellant, in footnote 9 at Page 18 of his brief, in addition to asserting that it cannot be determined from the record whether the court considered the documents as evidence, asserts that if the court did consider the documents offered by the defendant as evidence, the propriety of its so doing without a ruling as to their admissibility is open to serious question. Whatever technical niceties are involved in this point it is submitted that the error, if any, of the District Court, in failing to rule on the epecific objections of the plaintiff is harmless error, in view of the *Abo* case *supra,* and should be disregarded by this Court (Title 28, USC 2111, *Cf.* Rule 61 Federal Rules of Civil Procedure; *Barie v. Superior Tanning Co.,* 7 Cir., 182 F. 2d 724, 728. Indeed, if the District Court had excluded the documents it would now be our position that such exclusion would have been in the teeth of the mandate of this Court ordering their admission. Surely this plaintiff could not overcome this Court's decision in his case merely by dismissing the cause he had pending in one District Court, and by filing it in another within this same Judicial Circuit.

The trial of the issues without a jury began on January 19, 1952 (R. 93-189) and thereafter was resumed on November 20, 1952 (R. 189-199) at which time plaintiff filed an application for voluntary dismissal without prejudice to Rule 41(a)(2) of the Federal Rules of Civil Procedure (R. 61). The motion was denied (R. 68) and the trial of the cause was resumed (R. 189).

III.

Plaintiff's Testimony

A resume of the testimony of the plaintiff viewed in its most favorable light and offered in support of his allegations that his act of renunciation was coercion is as follows. He returned to the United States from Japan in 1940 for the reason that if he stayed in Japan another year he would be subject to draft by the Japanese Army and this he did not desire to do since he was an American (R. 120). In May of 1942 he was evacuated to an assembly center and this caused him to feel he was not wanted and that the United States did not need him (R. 107, 108). This feeling was further fostered by the experience of having a friend of his of Japanese ancestry, discharged from the United States Army, telling him that the Army did not need any Japanese in the United States Army (R. 109. He also stated that the statement of General DeWitt that "A Jap is a Jap and it don't make any difference if they have citizenship or not" also made him feel that he was not wanted in the United States (R. 110). At Tule Lake Relocation Center he found himself in a dirty, dusty encampment, surrounded by barbed wire and guarded by soldiers (R. 110), and he lived in cramped quarters with five other persons in the same room (R. 111).

While at the Tule Lake Center he heard of the Hoshi-dan and the Seinen-dan organizations (Pro-Japanese Organizations) beating people up and rumors that the persons so beaten were people who were against

the Japanese Government (R. 112). He also heard of a killing of a Mr. Hitome at the Camp and that it had been accomplished by the Hoshi-dan. When asked directly why he renounced his citizenship he stated he did so because he felt if he did not he would get beaten up like Hitome's brother and three others and killed like Hitome (R. 113). Four or five of his roommates were members of the Hoshi-dan and three of them told him he would be beaten up if he did not renounce his citizenship (R. 115), and they demanded that he renounce his citizenship because "they were not wanted in this country." (R. 116). He also testified that his roommates told him the questions that would be asked at the renunciation hearing and the answers that he should give and that if he did not give these answers he would be beaten up (R. 116). He heard a rmuor from his roommates that he was going to be sent back to Japan at the end of the War and if he did not show any loyalty to Japan he would be treated badly upon his arrival in Japan (R. 117). Finally he testified that at the beginning of 1945 he knew some people who went back to the Pacific Coast and he haird in discussions at the Tule Lake Camp that some of these people were beaten up and could not find a job (R. 118) and these rumors made him afraid to go out of camp (R. 119).

The foregoing testimony of the plaintiff, without reference to subsequent cross-examination, or evaluation in the light o fthe documentary evidence produced by the defendant, hereinafter discussed, constituted the effort of the plaintiff to carry his burden of proving that his renunciation was coerced and this because, as here-

inbefore stated, the presumption of coercion that his act of renunciation was involuntary was rebutted by the documentary evidence exhibited by the defendant in assuming his burden of going forward with the evidence.

SUMMARY OF ARGUMENT

I. The finding of the District Court that the plaintiff did not sustain his burden of proving that his renunciation of citizenship was duressed, is supported by substantial evidence, is not clearly erroneous, and accordingly, should not be set aside, *Rule 52(a), Federal Rules of Civil Procedure.* The documentary evidence introduced by the defendant sustained his burden of going forward with the evidence to refute the presumption of coercion accorded to plaintiff and was clearly relevant and material under the prior ruling of this Court in *McGrath et al. v. Abo, et al., supra.* Such evidence clearly indicates that the plaintiff, a Kibei, who lived the greater part of his minority in Japan, was loyal in his attitudes toward Japan and disloyal to the United States. His renunciation of citizenship was merely another link in the chain of his disloyalty to the United States and the Court below having the opportunity to observe his demeanor, particularly on cross-examination, and to judge his credibility, was justified in giving little or no weight to his uncorroborated self-serving testimony relative to threats of bodily harm made to him by members of pro-Japanese organizations at the Tule Lake Relocation Center which allegedly caused him to renounce his citizenship. The fact that

the defendant did not introduce any evidence directly contradicting the plaintiff's assertions of coercion does not militate against the finding of the court below that he failed in his burden of proof. *National Labor Relations Board v. Howell Chevrolet Co.,* 9 Cir., 204 F. 2d 79, 86 (affirmed *Howell Chevrolet Co. v. Labor Board,* 74 S. Ct. 214). Plaintiff is not entitled as a matter of law to a reversal of the judgment below on the strength of *Acheson v. Murakami, supra.* This is so because nothing in *Murakami, supra,* is *res adjudicata* on the question of whether the renunciation of this plaintiff or any other renunciant was coerced. Each renunciant has his own individual burden of proof. Duress is personal and the case of each renunciant must stand upon its own bottom. *Mar Gong v. Brownell,* 9 Cir., No. 13,787, decided January 12, 1954; *McGrath, et al. v. Abo, et al., supra.*

II. The trial court did not abuse its discretion in denying the plaintiff's motion to voluntarily dismiss this action under Rule 41(a)(2) of the *Federal Rules of Civil Procedure.* The great weight of authority is that the granting or denial of a voluntary dismissal without prejudice under Rule 41(a)(2) is a matter of judicial discretion the exercise of which will not be disturbed on appeal in the absence of clear abuse. *Moore, et al. v. C. R. Anthony Co.,* 10 Cir., 198 F. 2d 607, 608; *United States v. Pacific Fruit and Produce Co.,* 9 Cir., 138 F. 2d 367; *Ockert v. Union Barge Line Corp.,* 3 Cir., 190 F. 2d. 303, 304. Plaintiff's basis for his motion to dismiss was essentially, that being a lay-person, he needed the assistance of counsel to execute and submit to the De-

partment of State an affidavit setting forth the circumstances of and reasons for his renunciation of citizenship in order that he might be documented by the Department of State as an American citizen. Further, that in the absence of a showing of prejudice to the defendant he was entitled, as an absolute right, to dismiss this cause, the same being restricted only by the requirement that it be done upon such terms and conditions as the court deems proper. We submit these reasons are not persuasive since there is no showing that plaintiff could make any better showing of his case by submission of affidavits to the Department of State than if he testified fully on the matter at the trial of his case where he was represented by counsel. The plaintiff was admitted to this country on a certificate of identity for the express purpose of testifying at his trial, subject to deportation if he failed to establish his claim of American citizenship. The granting of his motion to dismiss would clearly abort his pending suit, which action was the only reason for his being in the United States. Under these circumstances the refusal of the court below to grant his motion was not an abuse of its discretion.

ARGUMENT

I.

The Ultimate Finding of the District Court That the Plaintiff Did Not Sustain His Burden of Proving That His Renunciation of United States Citizenship Was Involuntary Together With the Subordinate Findings of Fact Are Supported by the Evidence and Are Not Clearly Erroneous.

The District Court made twenty-five findings of fact which, with the exception of Finding No. 23, were either supported by facts agreed to by the parties in the pretrial order or were otherwise admitted by the plaintiff. Support for this assertion will be found in Appendix "B", *infra,* where there are set forth in tabular form the specific findings of fact and the record reference to evidence supporting such findings of fact.

The nub of this case is to be found in the aforementioned Finding of Fact No. 23 which states:

> "23. Plaintiff contends that during the time that he resided at Tule Lake Relocation Center there prevailed an atmosphere of intimidation, coercion, undue influence and duress, influencing him and others to renounce their United States citizenship. On this issue, plaintiff had the burden of proof and I find that plaintiff has not sustained this burden and that any such conduct if any in fact existed, did not influence plaintiff's free will, choice or desire to renounce his citizenship, and on the contrary, it is obvious that the Courts so finds that plaintiff's loyalty during all times herein involved was all to Japan and still is." (R. 76).

Having made this finding the Court in its conclusions of law stated as follows:

> "2. Plaintiff's contentions and *testimony* that he acted under force, fear, coercion and intimidation of Japanese aliens, and further that he felt the Government and the Army were no longer interested in having him as a citizen, are insufficient reasons to vacate plaintiff's renunciation of his citizenship and to restore to him the privilege of a national or citizen of the United States of America." (Emphasis supplied). (R. 77).

A reading of the quoted finding and conclusion of law clearly indicates that the District Court was of the opinion that the uncorroborated testimony of the plaintiff that he renounced his citizenship because he was afraid that if he did not, he would be physically assaulted by members of pro-Japanese organizations including three of his roommates, and that he felt that the United States Government and the Army were no longer interested in having him as a citizen were, in the light of all the evidence, insufficient reasons *insofar as this plaintiff was concerned.*

We submit that there is nothing in the findings of fact or conclusions of law which justifies the conclusion, that the District Court, in making its ultimate finding that plaintiff was not coerced into renouncing his citizenship, did not consider the coercive conditions existing at Tule Lake to be a part of plaintiff's case. We believe that a fair reading of the evidence indicates that the District Court in finding and concluding that the plaintiff's renunciation was not voluntary considered the documentary evidence introduced by the defendant, as

proof of plaintiff's loyalty to Japan and conversely disloyalty to the United States, and concluded from this and other evidence that the plaintiff, being so disposed, did not prove a coerced renunciation by asserting coercive action of persons, presumably equally loyal to Japan.

A.

ANALYSIS OF DEFENDANT'S DOCUMENTARY EVIDENCE AND PLAINTIFF'S TESTIMONY

This plaintiff, a Kibei[5] on February 19, 1943, while at the Poston Relocation Center executed a form entitled "Statement of United States Citizen of Japanese Ancestry" (Defendant's Pre-trial Exhibit No. 21(b)), wherein he stated in pertinent part, that to the best of his knowledge his birth was registered with a Japanese Governmental agency for the purpose of establishing a claim to Japanese citizenship and that he never applied for cancellation of such registration. In answer to Question 27 contained in this Statement, as to whether he was willing to serve in the Armed Forces of the United States on combat duty wherever ordered, the plaintiff answered in the negative. Question 28 of the aforementioned statement was as follows:

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[5]It will be remembered that plaintiff when a few months old was taken to Japan by his parents where he was educated and did not return to the United States until he was 20 years of age. That this is not without significance, is demonstrated by the decisions of this Court in the *Murakami* and *Abo* cases, where the Court characterizes many of such persons as "permanently pro-Japanese."

> "Will you swear unqualified allegience to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegience or obedience to the Japanese Emperor, or any other foreign Government, power, or organization?"

To this question, Murakami, answered as follows: "No, not at present time." (Defendant's Pre-trial Exhibit No. 21(b); DSS Form 304(A)). On the same date, namely, February 19, 1943, the plaintiff indicated to War Relocation Authority Personnel, that he did not desire any employment and that he would not take employment in any part of the United States (Defendant's pre-trial Exhibit No. 21(a); Form WRA 126(a)). On August 7, 1943, while still at Poston Relocation Center the plaintiff indicated to a Review Board for Segregation that his answer to Question 28 in Form DSS 304(A) was still "No", that the question was clear and that he wanted to go with his friends (Defendant's Pretrial Exhibit No. 21(c); Form WRA 277). On June 11, 1944, while at the Tule Lake Relocation Center the plaintiff executed and filed with the WRA a form entitled "Individual Request for Repatriation or Expatriation". He certified that the request was filed voluntarily (Defendant's Pre-trial Exhibit No. 21(d)). On December 20, 1944, the plaintiff executed and forwarded a letter to the Department of Justice in which he requested that there be sent to him all forms necessary to renounce his citizenship (Defendant's Pre-trial Exhibit No. 22(a)). Prior to February 15, 1945, plaintiff executed and forwarded to the Attorney General a form entitled "Application for Permission to Renounce United

States Nationality" (Defendant's Pre-trial Exhibit No. 22(c)).

On February 15, 1945, he was given a hearing on his renunciation of citizenship by a hearing officer at which there was an interpreter. A transcript of the minutes of the hearing on his renunciation of citizenship indicates that the plaintiff stated that he applied to renounce his citizenship; that the signature on the application form to renounce his citizenship was his own and that he signed it of his own free will. He stated that he wanted to give up his citizenship because his parents and a brother were in Japan and he had to go back to Japan since it was his duty to go to Japan and do whatever he could as a Japanese citizen; that he was loyal to Japan and believed in the divinity of the Emperor (Defendant's Pre-trial Exhibit No. 22(b)). On the same date he executed the formal document of renunciation of United States nationality which was approved by the Attorney General as not contrary to the interests of national defense (Defendant's Pre-trial Exhibit No. 23(a)).

By letter dated October 1, 1945 (subsequent to the termination of hostilities with Japan) the plaintiff attempted to withdraw and revoke his renunciation claiming that his renunciation was duressed and that he was intimidated and compelled to sign the renunciation form by threats of physical violence to himself (Defendant's Pre-trial Exhibit No. 24(a)). On October 27, 1945 the plaintiff executed a form entitled "Application for Repatriation" in which he stated that he desired to be repatriated to Japan unconditionally and without quali-

fication for the reason that his brother was serving in the Japanese Navy and should his brother not return from action it was his duty to look after his parents as he had no other brother or sister in Japan (Defendant's Pre-trial Exhibit No. 23(b); Form I-540, Immigration and Naturalization Service). On November 21, 1945, the Department of Justice in response to plaintiff's letter of October 1, 1945, advised him that revocation of his renunciation was not possible (Defendant's Pre-trial Exhibit No. 24(b)). On December 14, 1945, the plaintiff executed an application to go to Japan to live (Defendant's Pre-trial Exhibit No. 28).

With this evidence, the trial court weighed the plaintiff's testimony as to threats of violence if he did not renounce, clandestinely made insofar as this record reveals, and found such uncorroborated testimony insufficient to carry his burden of proving a coerced renunciation.

The appellant asserts at Pages 20-23 of his brief that the District Court erred because its ultimate finding was based solely on a consideration "that plaintiff's loyalty during all times herein involved was all to Japan and still is." Having adopted this premise of irrelevancy, appellant concludes that the Court excluded from consideration, the question of whether or not the renunciation was involuntary. We submit that the District Court's reference to the loyalty of the plaintiff to Japan, based upon documentary evidence introduced by the defendant, is not irrelevant or immaterial to the question of whether the act of abjuring and renouncing allegiance

to the United States was accomplished voluntarily. In support of this position the following excerpts from the decisions of this Court in the case of *McGrath v. Abo supra,* are pertinent.

> "The Attorney General also indicated his realization of his duty to the United States to prevent a restoration of citizenship to the *disloyal renunciants* who gave up their American citizenship voluntarily because of their sympathy with Japan and hoped for the latter's victory over the country of their birth * * *.
>
> "The record shows the certainty that many of the 4,315 plaintiffs who voluntarily renounced were *disloyal* to the United States. It discloses that many of the plaintiffs did not show any interest in setting aside their revocations until after the atomic bombing of Hiroshima and Nagasaki had made it clear that the Japanese cause was hopeless and that the material conditions in the United States had become greatly preferable to those in Japan" (P. 771-772). (Emphasis supplied).
>
> "The District Court rendered an interlocutory decree on the stipulated submission of the causes on the merits. It found on substantial evidence the coercive conditions existing at Tule Lake but correctly recognized the likelihood that some of the plaintiffs were *disloyal* Americans who renounced voluntarily." (P. 773).
> "Concerning the designants, the defendants have indicated their good faith in discharging their obligation to the individual *loyal* renunciants and their duty to prevent the restoration of citizenship to the *disloyal.*" (P. 774) (Emphasis supplied).

From the foregoing, it is evident that this Court was of the opinion that evidence of disloyalty to the United States and loyalty to Japan, as reflected by the defendant's various offers of proof, is relevant and pertinent

to the consideration of the question of whether or not such persons who renounced allegiance to the United States were, in many instances, likely to have done so voluntarily. We submit that the District Court was acting within proper limits in considering evidence of disloyal acts of the plaintiff when weighing his uncorroborated assertions as to the alleged coercion which caused him to renounce his citizenship. Particularly pertinent to the instant cast is the observation of Judge Bone in his dissenting opinion in *Takehara v. Dulles,* 9 Cir., 205 F. 2d 560, 563:

> "The obvious overriding personal interest of appellant in the outcome of the case, the inherent probability, or lack thereof of the truth of his story were clearly proper factors to be considered. The Court might well weigh as it did, the problem of whether cold objectivity characterized appellant's description of purely emotional reactions known only to himself."

In the instant case evidence as to plaintiff's loyalty to Japan clearly was available to counteract his self-serving assertions of events known only to himself and otherwise not specifically corroborated. It is here appropriate to note the proposition, so widely accepted, it needs no citation of authority, that on disputed fact questions Courts of Appeal afford great weight to the opportunity of the trial court, in reaching its findings, to observe the demeanor and the manner in which a person testified.

The appellant asserts in his brief that the trial court did not disbelieve the testimony of plaintiff or the veracity of his reasons for renouncing his citizenship but on

the contrary believed the plaintiff, yet, nevertheless held as a matter of law, that the renunciation was invalid (Brief, pp. 7-8, 12, 24). We assert, *per contra,* that the District Court held that the plaintiff did not sustain his burden of proving that his act of renunciation was involuntary, a result it patently could not have reached if it believed that this plaintiff's assertions were worthy of belief. The defendant did not and of course could not introduce *direct* evidence contradicting the assertions of this plaintiff that he renounced because he was not wanted in the United States and that his roommates, members of pro-Japanese organizations, threatened him with physical violence unless he did renounce. Accordingly it would appear that the only valid conclusion that can be drawn, in the light of the District Court's finding, is that the Court in weighing the plaintiff's assertions, in the light of the other evidence, did not accept as true the testimony of the plaintiff even though not specifically contradicted. Although the Court did not specifically indicate in its findings or opinion that it did not believe the recitation of the plaintiff as to specific acts of corecion, it seems obvious from a reading of the record as a whole, that the Court was well justified in having reservations as to the testimony of the plaintiff. For example, at the trial he testified that his reasons for renouncing were fear of bodily harm if he did not do so, and the feeling that the United States Government did not want him as a citizen. Compare this with the statements contained in his affidavit executed before a United States Consular Officer in Japan on October 11, 1950, (Defendant's Pre-trial Exhibit No. 26), wherein he

stated that the reason he renounced was that he feared he would be indefinitely or permanently interned and that there was no escape from internment except by renouncing his citizenship, and expecting to be removed to Japan involuntarily he feared that the Japanese in Japan would take reprisals against him if he did not renounce his citizenship. While it is true that the plaintiff seems to assert that his wife, who wrote the answers to the questions contained in the affidavit, somehow failed to put down all his reasons, it is equally true that nowhere is it asserted that the affidavit executed in Japan was done as a result of coercion or intimidation. It is almost impossible to believe, that if in fact the plaintiff renounced because of fear of physical violence, he would have refrained from asserting it in the aforementioned affidavit or that his wife would have failed to record it and this is particularly so when it is remembered that *the whole purpose of executing the affidavit looked to the possibility of his being documented as an American citizen.* While apparently the plaintiff cannot read English well, it is not far fetched to infer that the instructions for the preparation of the affidavit were made known to him and these instructions specifically state that if any action, including the act of renunciation, was taken as the result of fear caused by threats from individuals or groups of individuals the nature of the threats, the names of the individuals making them, if known, and the time, place and occasion for the making of the threats should be given. At the trial plaintiff named three persons (his roommates) whom he alleged threatened him with phy-

sical violence if he did not renounce his citizenship (R. 115, 116, 185). Nevertheless no mention of the roommates and their threatening actions was mentioned in the affidavit submitted with his passport application. He asserts in explanation of this that he did not remember the names at the time he made out the affidavit but that his memory was refreshed upon observing the forms exhibited to him by his counsel (presumably he is referring to the forms introduced in evidence by the defendant at pre-trial) and upon viewing the forms he remembered "those dates and the names" (R. 171). We submit that this taxes belief beyond bounds. Other aspects of plaintiff's activity and demeanor in testifying which might well justify the trial court in not attaching too much weight to his testimony are to be found in his inability to remember his own signature when it was exhibited to him (R. 141-142) and his statement that he did not know that his brother had left a relocation center or went to work (R. 134) whereas he admitted on cross-examination that at his renunciation hearing he stated that he knew his brother was working on a railroad. It would also appear that the trial court could not help but be impressed by the fact that almost without exception when testifying as to matters favorable to him his recollection and memory were unimpaired but on being cross-examined with reference to matters apparently unfavorable, on a least eight occasions, he indicated that he could not remember the matter under discussion (R. 140, 141, 142, 155, 156, 157, 170, 185).

Again, with respect to plaintiff's statement in the affidavit filed with his passport application (Defendant's

Pre-trial Exhibit No. 26) that, expecting to be removed to Japan involuntarily he feared that the Japanese in Japan would take reprisals against him if he did not renounce prior to his arrival in Japan, it should not be forgotten that he applied voluntarily for repatriation on June 11, 1944, prior to his renunciation and also on October 17, 1945, subsequent to his renunciation. In these circumstances, it is difficult to find support for the statement that he expected to be removed to Japan involuntarily.[6] Counsel for plaintiff in redirect examination directed plaintiff's attention to Defendant's Pre-trial Exhibit No. 23(b) (Application for Repatriation dated October 17, 1945) and drew from plaintiff the statement that he was not referring to Exhibit No. 23(b) when he testified that he executed it under pressure from the Hoshi-dan, but rather he was referring to the Application for Repatriation dated January 11, 1944 (Defend-

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[6]It is here pertinent to note that on December 19, 1944, prior to plaintiff's renunciation, Major General H. C. Pratt, Commanding General of the Western Defense Command, withdrew the public proclamations and orders of 1942 which had ordered the exclusion of all persons of Japanese ancestry from the West Coast area. Lifting of the exclusion orders permitted all such persons including plaintiff to return to the West Coast with the exception of named individuals who were served with individual exclusion orders. Plaintiff was not served with such an individual order and the Project newspaper, at Tule Lake, *The Newell Star, published this proclamation on the same* day (R. 18-19). While the present record does not indicate whether these events were brought to plaintiff's attention, it would seem that in the normal course of events he would have obtained such information since it is clear, that in addition to the Project newspaper, citizen evacuees at all times had access to newspapers, magazines and radios, including some short-wave sets.

ant's Pre-trial Exhibit No. 21(d); R. 175). How this impression could be gathered by the plaintiff is not understandable since the date of the document, namely October 17, 1945, was specifically drawn to his attention together with his statement as to the reasons he wished to be repatriated to Japan and, further, objection was made by counsel for the plaintiff on the grounds that it was made some eight months later than the plaintiff's renunciation of citizenship (R. 136-139). Furthermore, when shown Defendant's Pre-trial Exhibit No. 21(d) (Request for Repatriation dated June 11, 1944) he made no mention at all of any pressure being exerted on him by anyone (R. 145-146).

In citing these matters we do not think that we are magnifying them so as to give them a significance which the record will not sustain. In contradistinction to this Court's comments in the case of *Mar Gong v. Brownell, supra,* the matters which we discuss are for the most part directly related to the basic issue, namely, whether this plaintiff, with a record of pro-Japanese loyalty, involuntarily renounced his citizenship.

Plaintiff testified that the reason he returned to the United States in 1940 was that he was subject to draft in the Japanese Army if he stayed in Japan another year and that since he was an American he did not like to go in the Japanese Army (R. 119-120). Presumably he also did not desire to volunteer for the American Army in view of his negative answer to Question 27 of the Selective Service Form DSS-304A (Defendant's Pre-trial Exhibit No. 21(b)). Furthermore, in considering

his statement relative to his antipathy to becoming a draftee in the Emperor's armed services, it would not be unreasonable to draw the inference that he may have returned to he United States in 1940, in view of his knowledge that Japan was carrying on a war with China in Manchuria (R. 127-129). Finally, and presumably to explain his stay at Tule Lake where conditions existed which exposed him to coercion, he stated that at the beginning of 1945 he knew of some people who had gone back to the Pacific Coast where they could not find jobs and he also heard a rumor that some of them were being physically assaulted (R. 118, 119). As to this it should be remembered that plaintiff applied for forms upon which to renounce on December 20, 1944, prior to the actual lifting of the exclusion orders (Defendant's Pre-trial Exhibit No. 22(a)). Moreover, there is no evidence of record that he would have had to go to the Pacific Coast in any event and, while this might have been a more desirable place for him to return to, nevertheless if the choice was between subjecting himself to the pressure of renouncing his citizenship (something which he allegedly abhorred) (R. 117, 118) and the inconvenience of relocating other than to the Pacific Coast, it would appear that the choice for him was clear. Appropriate to note here is the language of *Doreau v. Marshall,* 3 Cir., 170 F. 2d 721, 724, cited in *Sovorgnan v. United States,* 338 U.S. 491:

> "The forsaking of American citizenship, even in a difficult situation, as a matter of expediency, with attempted excuse of such conduct later when crass material considerations suggest that course, is not duress."

In view of the foregoing we respectfully submit, that pursuant to the provisions of Rule 52(a) *Federal Rules of Civil Procedure,* the findings of fact of the District Court should not be set aside because they are not clearly erroneous. *United States v. Fotopulos,* 9 Cir., 180 F. 2d 631, 634; *Pacific Portland Cement Co. v. Food Machinery and Chemical Corp.,* 9 Cir., 178 F. 2d 541; *United States v. Aluminum Co. of America,* 3 Cir., 148 F. 2d 416, 433. In so stating we are not unaware of the rule that in considering documentary evidence Courts of Appeal may give the same, the weight they deem it entitled to *de novo. Smyth v. Barneson,* 9 Cir., 181 F. 2d 143, 144; *Western Union Telegraph Co. v. Bromberg,* 9 Cir., 143 F. 2d 288, 290. In view of this court's favorable comment on the defendant's various offers of documentary proof in the *Abo* case, *supra,* we urge that any *de novo* consideration should not produce disagreement with the weight given to such evidence by the court below. Indeed, had the District Court found otherwise, we would now assert, that, in the light of plaintiff's own acts, his testimony was a patent fabrication and absurd.

Particularly appropriate here is the language of this court in the *Pacific Portland Cement Co.* case, *supra,* where the Court said at Page 548 as follows:

> "* * * we are faced with the mandate of Rule 52(a) of the *Federal Rules of Civil Procedure* which bids us not to set aside findings unless they are 'clearly erroneous'. *Federal Rules of Civil Procedure,* Rule 52(a). Under the interpretation which the Supreme Court, and this and other courts of appeal, have placed upon this section, the findings of a trial judge will not be disturbed if supported by substantial evidence. Full effect will always be given to the

> opportunity which the trial judge has, *denied to us,* to observe the witnesses, judge their credibility and draw inferences from contradiction in the testimony of even the same witness."

The plaintiff is not aided in his cause by the mere fact that the defendant, apart from establishing the eloquent testimony of plaintiff's own act, was not able to produce any direct evidence to contradict his recitations as to his state of mind and specific instances of alleged coercion, known of course, only to himself. *National Labor Relations Board v. Howell Chevrolet Company, supra.* A host of cases in support of this proposition are also cited by Judge Bone in his dissent in *Takehara v. Dulles, supra,* footnote 3.

We believe that the evidence of record indicates that prior to, at the time of, and subsequent to his renunciation his loyalty was wholly to Japan and not to the United States and accordingly the trial court was fully justified in giving little or no weight to plaintiff's testimony. Paraphrasing the language of *Knauer v. United States,* 328 U.S. 654, 660:

> "We conclude with the District Court and the Circuit Court of Appeals that there is solid, convincing evidence that *Murakami* before the date of his *renunciation,* at that time, and subsequently was *loyal to Japan* * * *. The conclusion is irresistible therefore that when he *renounced* allegiance to the *United States* * * * *he did so voluntarily.*" *Cf. Angello v. Dulles,* D.C. N.Y., 110 F. Supp. 689, 692.

The appellant further asserts in his brief (p. 12), having made the assumption that there is no question of credibility or conflict of evidence in the instant case,

that he is entitled to a judgment that he is a citizen of the United States as a matter of law, in view of the holding of this Court in the case of *Acheson v. Murakami, supra.* As hereinbefore demonstrated there is a very definite question of credibility here present. Moreover, the question of duress we submit is a personal one, and the mere recitation of some of the similar, although incomplete, facts of record in the *Murakami* case and the instant case, does not present an *a fortiori* case of duress for the plaintiff.[7] Additionally, an examination of the record in the case of *Acheson v. Murakami, supra,* does not indicate that the parties applied for repatriation prior and subsequent to their renunciation of citizenship or refused to swear loyalty to the United States or voluntarily returned to Japan. In fact the record shows that the female plaintiffs, *Sumi, Shimizu* and *Mae Murakami,* were given mitigation hearings at their request subsequent to their renunciation and remained in the United States.

Appellant, in pages 20 through 26, of his brief, attempts to demonstrate error on the part of the District Court by arguing that the District Court disregarded various factors which this Court has held may cause one's acts to be involuntary and based its judgment on an irrelevant consideration. We do not believe this asser-

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[7]It would seem pertinent to here refer to *Mar Gong v. Brownell, supra,* wherein this Court stated: "Similarly we think that the Court here should not have given weight to its experiences, unfortunate as they may have been, in other cases, in arriving at its findings with respect to this appellant. Each case should be allowed to stand upon its own bottom."

tion to be correct. The District Court found that the plaintiff's testimony that he was coerced was, *in his case,* insufficient to carry his burden of proof and this in the light of the whole record. Presumably what appellant complains of is that the trial court did not view the evidence in the manner in which he would have desired the Court to view it.[8] Even assuming *arguendo* that the trial court could have viewed the facts differently or even that this Court would have done so if it were the initial trier thereof, this alone, we submit, would not justify reversal.*Nee v. Linwood Securities Co.,* 8 Cir., 174 F. 2d 434, 437; *Skelly Oil Co. v. Holloway,* 8 Cir., 171 F. 2d 670, 674; *Cf. U. S. Line Company v. Cummings,* 9 Cir., 195 F. 2d 221, 223; *Continental Casualty Co. v. Schaefer,* 9 Cir., 173 F. 2d 5, 8; Cert. den. 337 U.S. 940. See and compare *Pandolfo v. Acheson,* 2 Cir., 202 F 2d 38, 40-41.

In the instant case the Court in its findings of fact No. 23 (R. 76), squarely met the fact issue of whether or not the plaintiff's act of renunciation was involuntary. As we read *Takehara, supra,* cited by appellant as requiring reversal of the trial court, we believe that that decision can properly be considered only as a rejection of the theory that *Takehara* was required to take affirmative steps to preserve his claim to American citizen-

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[8]Certainly, in view of plaintiff's rebuttable presumption, the trial court was under no duty to specifically set forth in its findings of fact every conceivable fact of record pertaining to the general conditions at Tule Lake.

ship,[9] and as a remand for a finding on one of the important issues of the case, namely, whether the evidence established that plaintiff there, voted in the Japanese elections as a result of duress.

In urging the affirmance of the trial court's finding, that plaintiff did not sustain his burden of proving a coerced renunciation, we submit that this Court in passing on this disputed issue of fact should take the view of the evidence and all of the inferences reasonably deduc-

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[9]The appellant at Page 25 of his brief makes reference to portions of the trial court's Finding No. 22 (R. 76) and its opinion (R. 70), wherein mention is made that this plaintiff was a citizen of Japan by virtue of his birth of Japanese parents and that when he renounced citizenship in the United States he automatically accepted citizenship in Japan. From this appellant argues, albeit faintly, that the trial court in some manner erroneously held that the plaintiff by his actions "elected" Japanese citizenship and therefore lost his United States citizenship citing *Mandoli v. Acheson,* 344 U.S. 133. In order that there may be no misunderstanding, appellee's position in this cause is that plaintiff's renunciation of citizenship was voluntarily accomplished pursuant to the provisions of Title 8 USC 801(i). Nothing of record in the instant case makes appropriate the citation of *Mandoli, supra,* and although the trial court did state that when this plaintiff renounced United States citizenship he automatically accepted citizenship in Japan, we believe such statement to be unnecessary, since it is not germane to the issue as presented in this case. This is so for the reason that the Court below having found that the plaintiff did not sustain his burden of proving that his renunciation was coerced, the plaintiff was subject to deportation by the very terms of the certificate of identity issued to him entirely apart from any question as to his possession of dual citizenship by virtue of his birth, prior to the 1924 amendment to the Japanese law, see *Naito v. Acheson,* D. C. Cal. 106 F. Supp. 770, 772.

tible therefrom, which are most favorable to the prevailing party. *Maryland Casualty Co. v. Stark,* 9 Cir., 109 F. 2d 212, 215; *Skelly Oil Co. v. Holloway, supra; Maryland Casualty Co. v. Cushing,* 7 Cir., 171 F. 2d 257, 259.

II.

The Court Below Did Not Abuse Its Discretion in Refusing to Grant Plaintiff's Motion for Voluntary Dismissal Made Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

The provisions of Rule 41 of the Federal Rules of Civil Procedure pertinent to the matter here under discussion are as follows:

> "*Dismissal of Actions*
>
> "(a) Voluntary Dismissal; Effect Thereof.
>
> "(1) *By Plaintiff; by Stipulation.*
>
> "Subject to the provisions of Rule 23(c) of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action * * *
>
> "(2) *By Order of Court.*
>
> "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper. * * *"

This Court judicially knows that the present plaintiff was a party plaintiff in the case of *McGrath v. Abo, supra,* at the time that it remanded that cause to the District Court for the Northern District of California. (See footnote 3, page 2, *supra*). The complaint in the present case was filed in the District of Oregon on August 10, 1951 (R. 2-4), and the answer thereto filed by the Defendant October 19, 1951 (R 5-6). A certificate of identity was issued to this plaintiff pursuant to the provisions of Title 8 USC 903 on December 10, 1951 and he arrived in the United States in January of 1952. The pre-trial order was entered on January 19, 1952 (R. 55) and trial was begun on the same date, namely, January 19, 1952 (R. 93). The proceedings therein were terminated on that day and were not resumed until some ten months later, on November 20, 1952 (R. 189). On November 19, 1952, the plaintiff filed an application for voluntary dismissal pursuant to Rule 41(a)(2), *Federal Rules of Civil Procedure* which motion was supported by affidavits of plaintiff and his counsel (R. 62-67). The Court having heard the statements of counsel (R. 189-195) (counsel for defendant objected to the granting of the motion) entered its order denying said motion on November 20, 1952, whereupon proceedings in the trial were resumed. The substance of the affidavit filed by plaintiff's counsel (R. 62) is to the effect that when the plaintiff executed the supplemental affidavit submitted with his passport application in Japan, he did not have the assistance of counsel and that, as a lay-person, he was unable to make a proper showing, without the assistance of counsel that his case should be administratively considered to come

within the purview of the *Murakami* and *Abo* decisions, *supra*. The affidavit of the plaintiff (R. 66) was to the effect that on November 18, 1952, he went to an office of the Department of State in Seattle, Washington, to file an application for a passport but when told that he would be required to fill out a supplemental affidavit it was his feeling that he should consult an attorney before so doing since he had been unsuccessful in convincing appropriate governmental officials that his renunciation was involuntary when he filed a similar affidavit in Japan.[10] On the basis of these assertions the appellant asserts that the trial court acted arbitrarily and abused its discretion in denying the motion. He also appears to assert in his brief that the motion should have been granted because the defendant would not have suffered any prejudice thereby (p. 28) and that therefore the plaintiff was entitled to a dismissal as a matter of right, the same being restricted only upon order of the court and upon such terms and conditions as the trial court

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[10]Appellant asserts at Page 27 of his brief that had the trial court permitted the dismissal, that might well have obviated the necessity of a trial and in support of this cites the case of one Tomi Katsuda, who having failed once to obtain an administrative determination that her case was within the provisions of *Acheson v. Murakami, supra,* upon subsequent submission of an affidavit, aided by counsel, she obtained a favorable administrative determination. This assertion presupposes that the mere retention of counsel will *ipso facto* result, in the case of every renunciant, in a favorable administrative decision. In addition to denying the validity of this supposition we think it here appropriate to again refer to this Court's comment in *Mar Gong v. Brownell, supra,* wherein it is stated that each case should be allowed to stand upon its own bottom.

deemed proper. In stating this proposition he appears to rely for the most part on two District Court cases and a decision of the Court of Appeals for the Seventh Circuit: *Maryland Casualty Co. v. Quality Foods,* 8 FRD 359, 361, 362 (D.C. E.D., Tenn., 1948); *Welter v. E. I. du-Pont De Nemours & Co.,* 1 FRD 551 (D.C. Minn., 1941); *Bolten v. General Motors Corporation,* 180 F. 2d 379.

We believe that the short answer to this contention is that the authorities cited by the appellant constitute the minority view that the great weight of authority is that the granting or denial of a voluntary dismissal without prejudice under Rule 41(a)(2) is a matter of judicial discretion the exercise of which will not be disturbed on appeal in the absence of clear abuse. *Moore, et al. v. C. R. Anthony Co., supra; United States v. Pacific Fruit and Produce Company, supra; Ockert v. Union Barge Line Corp., supra; Rollison v. Washington National Insurance Co.,* 4 Cir., 176 F. 2d 364. In the *Ockert* and *Moore* cases, *supra,* both the Third and Tenth Circuits, noted the *Bolten* decision, *supra,* but in both cases indicated, that the majority and better reasoned view was to the effect that the power of a District Court to order a dismissal of a case without prejudice is a matter of judicial discretion which will not be disturbed on appeal. While it is true that the Eighth Circuit in the case of *Home Owners Loan Corporation v. Huffman,* 8 Cir., 134 F. 2d 314, cited by appellant in his brief, held that under the undisputed facts and circumstances of that case the trial court abused its discretion in permitting a dismissal without prejudice, nevertheless it took

pains to point out that upon a plaintiff's motion to dismiss without prejudice it is not the equities of the plaintiff that are the subject for consideration under the rule but rather the protection of the rights of the defendant. In amplification of this principle the Court in the *Huffman* case stated as follows at Page 318:

> "The defendant argues that some of the reasons for overruling the motion stated by the trial court in its opinion and comment at the hearing are invalid and do not support the order. This Court can not inquire into and examine the mental operations of the trial court in its exercise of a discretionary power. On such an appeal as this, we are limited to a consideration of whether the order itself constitutes an abuse of discretion in that it infringes the legal and equitable rights of the defendants as shown by the circumstances or facts conceded or undisputed."

Applying the principles of the aforementioned cases we do not think that it can fairly be said that the trial court in denying the plaintiff's motion to dismiss clearly abused its discretionary power. Certainly the fact that present counsel for the appellant did not become acquainted, until subsequent to January 19, 1952, with a part of the Government's brief filed on appeal in *McGrath v. Abo, supra,* (decided January 17, 1951, while plaintiff was still a party to that action), referring to potential administrative relief available to renunciants upon the filing of affidavits with passport applications, is not indicative of an abuse of discretion by the trial court. *Cf. United States v. Pacific Fruit and Produce Company, supra.* Furthermore, we are at a loss to understand what appellant could accomplish in the way of clarifying the circumstances of his renunciation by the affidavit procedure that could not be more readily accomplished,

after consultation with counsel, by direct testimony at this trial. Certainly there is nothing of record which indicates that counsel for appellant did not have ample time to confer with the appellant prior to the trial of this cause.

It is asserted in the affidavit of plaintiff's counsel, that unless a person, even a lawyer, were familiar with the decision of this Court in *Acheson v. Murakami,* he might very well fill out the affidavit without touching upon matters "the Attorney General or the State Department were looking for." We submit that there are no questions in the affidavit which are in and of themselves so difficult that they can not be adequately answered by the mere recitation of the truth of the matter. That many persons in Japan were able to execute affidavits as to whom the Department of State advised the appropriate Consular Officer that their cases might be considered as coming within the purview of the *Murakami* decision is attested to by a copy of the letter from the Department of State dated January 22, 1954 (set forth in Appendix "C", *infra*), in which they advise that the records of that Department, taken from available renunciant files, disclose that various American Consular Posts in Japan were notified that the passport applications of at least 184 renunciants resident in Japan, who filed affidavits, were approved.[11]

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[11]The records of the Department of Justice indicate that out of a total of 768 affidavit submissions, both foreign and domestic, the Department of State had been advised by the Justice Department as of January 31, 1954, that the cases of 252 affiant renunciants could be considered as coming within the purview of the *Murakami* decision.

As to the affidavit filed by the plaintiff, he seems to assert that the trial court abused its discretion because in effect he was deprived of having two strings to his bow. This is evidenced by his statement that, subsequent to his submission of a supplementary affidavit in Japan, found to be unsatisfactory, he should have been given the opportunity, upon his arrival in this country on a certificate of identity for the express purpose of testifying at his trial, to submit an additional affidavit after consultation with his counsel. Such a contention is not encompassed within the framework of the administrative procedure announced by the Department of Justice and the Department of State and concurrence with such an assertion would be tantamount to encouraging acts looking to the aborting of the very action upon which the certificate of identity for entering the country was issued. We respectfully submit that the comment of the District Court is sound when, in hearing this motion, it stated that in its opinion, it is prejudicial to the Government of the United States to have a person in the United States that may not be entitled to be here. The provisions of former title 8 USC 903 clearly indicate that the reason for permitting a person, such as the plaintiff, to come into the United States is to prosecute to a final conclusion a *pending* court action. To permit such person to dismiss their cause without prejudice in order to substitute an administrative proceeding for judicial adjudication would afford an easy means of circumventing the provisions of the statute. Additionally, it is to be noted that in repealing Section 903 of Title 8 USC, the Congress has provided, in the case of persons living

abroad who claim a right or privilege of a national of the United States has been denied them by a department or agency of the United States, that there may be issued to them a certificate of identity and while in possession thereof they may apply for admission to the United States at any port of entry, but that a final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review only in habeas corpus proceedings. *Title 8 USCA Sec. 1503(b) & (c).* This clearly indicates the Congressional policy to be that pending the determination of the question of claimed nationality by a person resident abroad, the claimant should not be in the position of litigating the question as an ordinary civil law suit but rather that the question be speedily determined in habeas corpus proceedings attendant with custody of the claimant. Accordingly we submit that there has been no showing of an abuse of discretion by the District Court in denying the plaintiff's motion for voluntary dismissal.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the District Court is correct and accordingly should be affirmed.

WARREN E. BURGER,
Assistant Attorney General;

C. E. LUCKEY,
United States Attorney;

VICTOR E. HARR,
Assistant United States Attorney;

ENOCH E. ELLISON,
Attorne, Department of Justice;

PAUL J. GRUMBLY,
Attorney, Department of Justice.

APPENDIX A

GENERAL OFFER OF PROOF

I

With respect to the foregoing designated plaintiffs, the defendants will introduce additional documentary evidence showing that such persons received their education and formal schooling in Japan, were leaders of pro-Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship at Tule Lake, voluntarily returned to Japan. (94)

II

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons were leaders of pro-Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship, voluntarily returned to Japan. (76)

III

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan, were members of pro-Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship at Tule Lake, voluntarily returned to Japan. (331)

IV

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons were members of pro-

Japanese organizations at Tule Lake, and subsequent to their renunciations of citizenship, voluntarily returned to Japan. (382)

V

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan and subsequent to their renunciations at Tule Lake. voluntarily returned to Japan. (281)

VI

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons subsequent to their renunciations at Tule Lake, voluntarily returned to Japan. (284)

VII

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence showing that such persons received their education and formal schooling in Japan, were leaders of pro-Japanese organizations at Tule Lake, applied for expatriation prior to their renunciations of citizenship, and are presently under Alien Enemy Removal Orders of the Attorney General. (6)

VIII

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their education and formal schooling in Japan, applied for expatriation at Tule Lake prior to their renunciations of

citizenship, and are under Alien Enemy Removal Orders of the Attorney General. (217)

IX

With respect to the foregoing designated plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of pro-Japanese organizations at Tule Lake, applied for expatriation prior to their renunciations of citizenship, and are under Alien Enemy Removal Orders of the Attorney General. (7)

X

With respect to the foregoing plaintiff, the defendants will introduce documentary evidence which will show that such person received his education and formal schooling in Japan, was a leader of a pro-Japanese organization at Tule Lake, and is presently under Alien Enemy Removal Order of the Attorney General. (1)

XI

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons are under Alien Enemy Removal Orders of the Attorney General and have otherwise demonstrated that their renunciation of citizenship was voluntary. (69)

XII

With respect to the foregoing plaintiffs, the defendants will introduct documentary evidence which will show that such persons received their schooling and formal education in Japan, were leaders of a pro-Japanese organization at Tule Lake and applied for

expatriation prior to their renunciations of citizenship, but are not under Removal Orders of the Attorney General. (21)

XIII

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their schooling and formal education in Japan, and applied for expatriation prior to their renunciations of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General. (1066)

XIV

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of a pro-Japanese organization at Tule Lake and applied for expatriation prior to their renunciations of citizenship, but are not under Removal Orders of the Attorney General. (13)

XV

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence that such persons applied for expatriation prior to their renunciations of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General. (1076)

XVI

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons received their schooling and formal education in Japan and applied for expatriation subsequent to their renunciation of citizenship at Tule

Lake, but are not under Removal Orders of the Attorney General. (7)

XVII

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons were leaders of a pro-Japanese organization at Tule Lake and applied for expatriation subsequent to their renunciation of citizenship at Tule Lake, but are not under Removal Orders of the Attorney General. (8)

XVIII

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons applied for expatriation subsubsequent to their renunciation of citizenship at Tule Lake. (11)

XIX

With respect to the foregoing plaintiffs, the defendants will show that such persons, although they did not receive their education in Japan, were not leaders of a pro-Japanese organization at Tule Lake, did not apply for expatriation prior or subsequent to their renunciation of citizenship and are not under Removal Orders of the Attorney General, nevertheless, otherwise demonstrated that their renunciation of citizenship was voluntary. (278)

XX

With respect to the foregoing plaintiffs, the defendants will introduce documentary evidence which will show that such persons did not renounce their citizenship at Tule Lake Segregation Center, and were not

therefore subjected to the factors which this Court held, in its interlocutory decree, to be of such a nature that they cast the taint of incompetency upon the acts of renunciation of citizenship. (83)

* * *

Defendant's Return to Court's Order to Show Cause Why Previously Filed Designation of Plaintiff Should Not Be Stricken.

* * *

"(3) With respect to those persons named in Exhibit XI through XIX of the designation filed as aforesaid, the defendants in response to the said order to show cause now offer to prove in addition that all of the designated plaintiffs in the said Exhibits XI through XIX, inclusive, with the exception of the following named persons, were at the Tule Lake Segregation Center as a result of answering * * Question 28 in the negative or as the result of refusing to answer the same."

* * *

APPENDIX B

Finding of Fact No.	Supported By
1. (R. 71)	Pre-trial Order No. 1. (R. 7)
2. (R. 71-72)	Pre-trial Order No. 2. (R. 7)
3. (R. 72)	Pre-trial Order No. 3. (R. 7)
4. (R. 72)	Pre-trial Order No. 4. (R. 7-8)
5. (R. 72)	Pre-trial Order No. 5. (R. 8)
6. (R. 72-73)	Pre-trial Order No. 6. (R. 8)
7. (R. 73)	Pre-trial Order No. 7. (R. 8)
8. (R. 73)	Pre-trial Order No. 8. (R. 8-9)
9. (R. 73)	Matter of Law
10. (R. 73-74)	Pre-trial Order No. 33. (R. 18)
11. (R. 74)	Pre-trial Order No. 34. (R. 19)
12. (R. 74)	Pre-trial Order No. 30. (R. 17)
13. (R. 74-75)	Pre-trial Order No. 38. (R. 20)
14. (R. 75)	Admitted in plaintiff's contention 43 (R. 33, 41)
15. (R. 75)	Admitted in plaintiff's contention 44 (R. 33, 41)
16. (R. 75)	Hearing admitted in plaintiff's contention 45 (R. 33, 34, 41)
17. (R. 75)	Signing admitted in plaintiff's contention 46 (R. 34, 41, 42)
18. (R. 75)	Admitted in contention of plaintiff 47 (R. 34, 42)
19. (R. 75)	Admitted in plaintiff's contention 48 (R. 34) and defendant's contention 46 (R. 42)
20. (R. 75-76)	Pre-trial Order No. 48. (R. 22)
21. (R. 76)	Pre-trial Order No. 49. (R. 22)
22. (R. 76)	Defendant's pre-trial exhibit 21(b) (DSS Form 304A)
23. (R. 76)	Ultimate finding in issue.
24. (R. 77)	Complaint
25. (R. 77)	Provided by 8 USC 903. (Conclusion of Law)

APPENDIX C

DEPARTMENT OF STATE

Washington

In reply refer to
F130-Murakami, Yoshio January 22, 1954

Mr. Warren E. Burger
Assistant Attorney General
Department of Justice
Washington 25, D. C.

Attention: Mr. Ellison

My dear Mr. Burger:

Reference is made to your letter of January 13, 1954 regarding the case of Yoshio Murakami v. Dulles, File 146-54-3973, 146-54-5637.

You request information as to the number of affiant renunciants resident in Japan as to whom this Department advised the appropriate Consular Officer that their cases might be considered as coming within the purview of the Murakami decision, and who should, therefore, if they had not otherwise expatriated themselves, be documented as American citizens. Presumably, such persons in making out their affidavits in Japan were not assisted by counsel familiar with the *Murakami* decision or with the Government's brief filed in the *Abo* case, the contents of which brief counsel for plaintiff asserts led him to the belief that legal assistance was required in executing the aforementioned affidavit.

The records of this Department taken from available renunciant files disclose that this office has notified various American Consular Posts in Japan that the passport applications of 184 renunciants resident in Japan were approved, based upon the fact that the cases were considered as coming within the purview of the Murakami decision. This figure is the minimum figure, based upon records which are currently available. It is believed that similar decisions were made in 15 or 20 additional cases the records of which are not presently available.

Sincerely yours,

/s/ R. B. Shipley
R. B. Shipley
Director, Passport Office

Enclosure:
Copy of this letter.